

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RACHAEL B.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C20-5897-SKV

ORDER REVERSING THE
COMMISSIONER'S DECISION

Plaintiff seeks review of the denial of her applications for Supplemental Security Income and Disability Insurance Benefits. Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

Plaintiff was born in 1982, has a 10th-grade education and training as a nursing assistant, and has worked as a car wash attendant, in-home caregiver, certified nursing assistant, food service worker, and Amazon delivery driver. AR 55, 77, 341-42. Plaintiff was last gainfully employed in January 2020. AR 81.

1 In February 2019, Plaintiff applied for benefits, alleging disability as of January 9, 2019.
 2 AR 56, 269-88. Plaintiff's applications were denied initially and on reconsideration, and
 3 Plaintiff requested a hearing. AR 193-201, 205-20. After the ALJ conducted a hearing in
 4 January 2020 (AR 45-117), the ALJ issued a decision finding Plaintiff not disabled. AR 26-38.

5 THE ALJ'S DECISION

6 Utilizing the five-step disability evaluation process,¹ the ALJ found:

7 **Step one:** Plaintiff has not engaged in substantial gainful activity since the alleged onset
 8 date.

9 **Step two:** Plaintiff has the following severe impairments: benign brain tumor (glioma),
 10 headaches, schizoaffective disorder, generalized anxiety disorder, and bipolar disorder.

11 **Step three:** These impairments do not meet or equal the requirements of a listed
 12 impairment.²

13 **Residual Functional Capacity:** Plaintiff can perform a full range of work at all
 14 exertional levels, with the following nonexertional limitations: she can tolerate occasional
 15 exposure to hazards, such as unprotected heights or moving machinery. She can
 16 occasionally drive commercially. She can understand, remember, and apply detailed but
 not complex instructions and perform predictable tasks. She cannot work in a fast-paced
 production-type environment. She can tolerate exposure to occasional workplace
 changes and have occasional interaction with the general public.

17 **Step four:** Plaintiff cannot perform past relevant work.

18 **Step five:** As there are jobs that exist in significant numbers in the national economy that
 19 Plaintiff can perform, Plaintiff is not disabled.

20 AR 26-38.

21 The Appeals Council denied Plaintiff's request for review, making the ALJ's decision the
 22 Commissioner's final decision. AR 1-6. Plaintiff appealed the final decision of the
 23 Commissioner to this Court. Dkt. 1.
 24

25 ¹ 20 C.F.R. §§ 404.1520, 416.920.

² 20 C.F.R. Part 404, Subpart P, App. 1.

LEGAL STANDARDS

Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of social security benefits when the ALJ’s findings are based on harmful legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a general principle, an ALJ’s error may be deemed harmless where it is “inconsequential to the ultimate nondisability determination.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (cited sources omitted). The Court looks to “the record as a whole to determine whether the error alters the outcome of the case.” *Id.*

Substantial evidence is “more than a mere scintilla. It means - and means only - such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (cleaned up); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for evaluating symptom testimony, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner’s conclusion that must be upheld. *Id.*

DISCUSSION

Plaintiff argues the ALJ erred in (1) assessing her brain tumor at steps two and three; (2) assessing her pseudoseizures at step two; (3) assessing the medical opinion evidence; (4) discounting Plaintiff’s subjective testimony and failing to discuss lay evidence; and (5) failing to further develop the record and/or hold the record open to permit submission of additional

1 evidence. Dkt. 23 at 1-2. The Commissioner argues the ALJ's decision is free of harmful legal
 2 error, supported by substantial evidence, and should be affirmed.

3 **A. The ALJ Erred at Steps Two and Three**

4 Plaintiff argues that the ALJ mischaracterized her brain tumor, which led to error at steps
 5 two and three, and erred in finding that her pseudoseizures had never been diagnosed and were
 6 therefore not medically determinable. The Court will address each condition in turn.

7 *1. Legal Standards*

8
 9 At step two, a claimant must make a threshold showing that her medically determinable
 10 impairments significantly limit her ability to perform basic work activities. *See Bowen v.*
 11 *Yuckert*, 482 U.S. 137, 145 (1987); 20 C.F.R. §§ 404.1520(c), 416.920(c). “Basic work
 12 activities” refers to “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§
 13 404.1522(b), 416.922(b). “An impairment or combination of impairments can be found ‘not
 14 severe’ only if the evidence establishes a slight abnormality that has ‘no more than a minimal
 15 effect on an individual’s ability to work.’” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996)
 16 (quoting Social Security Ruling 85-28). “[T]he step two inquiry is a de minimis screening
 17 device to dispose of groundless claims.” *Smolen*, 80 F.3d at 1290. An ALJ is also required to
 18 consider the “combined effect” of an individual’s impairments in considering severity. *Id.* A
 19 diagnosis alone is not sufficient to establish a severe impairment. Instead, a claimant must show
 20 her medically determinable impairments are severe. 20 C.F.R. §§ 404.1521, 416.921.

21
 22 At step three, the ALJ considers whether one or more of a claimant’s impairments meet
 23 or medically equal an impairment listed in Appendix 1 to Subpart P of the regulations. “The
 24 listings define impairments that would prevent an adult, regardless of his age, education, or work
 25 experience, from performing *any* gainful activity, not just ‘substantial gainful activity.’”

1 *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990) (emphasis in original; citations omitted). A mere
 2 diagnosis does not suffice to establish disability. *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th
 3 Cir. 1985). “[An impairment] must also have the *findings* shown in the Listing of that
 4 impairment.” *Id.* at 1549-50 (quoting 20 C.F.R. § 404.1525(d); emphasis added in *Key*). To
 5 meet a listing, an impairment “must meet *all* of the specified medical criteria.” *Sullivan*, 493 U.S.
 6 at 530 (emphasis in original). “To equal a listed impairment, a claimant must establish
 7 symptoms, signs and laboratory findings ‘at least equal in severity and duration’ to the
 8 characteristics of a relevant listed impairment[.]” *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir.
 9 1999); 20 C.F.R. § 416.926 (a).

11 2. *Brain Tumor*

12 As noted above, the ALJ listed Plaintiff’s brain tumor (glioma) as a severe impairment at
 13 step two, and characterized it as “benign.”³ AR 29. The Commissioner essentially concedes that
 14 the ALJ erred in describing Plaintiff’s tumor as benign, when it was in fact a malignant low-
 15 grade tumor, but argues that this error was harmless because Plaintiff has not shown that the
 16 ALJ’s mischaracterization led to prejudice. Dkt. 24 at 6.

17 But one result of the ALJ’s characterization error occurred at step three: the ALJ assessed
 18 whether Plaintiff’s tumor met the listing applicable to benign tumors, rather than the listing
 19 applicable to malignant tumors. *See* AR 30 (addressing whether Plaintiff’s tumor met or equaled
 20 Listing 11.05). According to Plaintiff, the ALJ should have instead considered whether she met
 21 or equaled Listing 13.02 or Listing 13.13. *See* Dkt. 23 at 4.

23 The State agency physicians considered those listings, however, and found that Plaintiff
 24 did not meet or equal either of them, although they did not provide any explanation to support

25 _____
³ Thus, Plaintiff’s repeated assertion that the ALJ found her tumor to be non-severe (and/or not medically determinable) is inaccurate. Dkt. 23 at 1, 4, 8, 13.

1 the conclusion, nor did they have access to the entire record before the ALJ, including updated
 2 imaging of the tumor. *See* AR 162-63, 166, 181, 184. Plaintiff argued to the ALJ that her tumor
 3 met Listing 13.02 and/or 13.13 (AR 428-29), and she renews that argument here. Dkt. 23 at 3-4.

4 Plaintiff presented at least a plausible theory to the ALJ of how her tumor meets a listing.
 5 *See* AR 429 (indicating that Plaintiff's tumor, a glioblastoma, is one of the diagnoses referenced
 6 in Listing 13.13, which provides that certain diagnoses *per se* meet the listing); 20 C.F.R. Pt.
 7 404, Subpt. P, App. 1, §§ 13.00(K)(6), 13.13. The ALJ should have addressed this listing in the
 8 decision. *Cf. Burch v. Barnhart*, 400 F.3d 676, 682-83 (9th Cir. 2005) (finding no step-three
 9 error when plaintiff pointed to no evidence indicating that she met or equaled any particular
 10 listing). On remand,⁴ the ALJ shall reconsider Plaintiff's brain tumor at steps two and three and
 11 explicitly address whether Plaintiff meets or equals Listing 13.02 and/or 13.13.

13 3. *Pseudoseizures*

14 Plaintiff argues that the ALJ erred in finding that she had not been diagnosed with
 15 pseudoseizures, pointing to evidence that a treating physician "ratified" such a "diagnosis from
 16 neurology[.]" Dkt. 23 at 10 (citing AR 659). When the cited treatment note is read in its
 17 entirety, however, it becomes clear that the doctor did not diagnose pseudoseizures, but
 18 recommended that Plaintiff decrease a medication in order to determine if seizures would occur,
 19 and if so, the seizures may be caused by her brain tumor. *See* AR 660. The doctor
 20 "[e]mphasized the importance of diagnosing seizure versus Pseudoseizures[.]" which suggests
 21

22
 23 ⁴ Although Plaintiff requests, in the alternative, a remand for a finding of disability (Dkt. 23 at 2, 13; Dkt.
 24 25 at 8), Plaintiff makes no attempt to show that this extraordinary remedy would be appropriate here. *See*
 25 *Leon v. Berryhill*, 880 F.3d 1044, 1045 (9th Cir. 2017) ("An automatic award of benefits in a disability
 benefits case is a rare and prophylactic exception to the well-established ordinary remand rule."). The
 Court finds that further proceedings would serve the useful purpose of allowing the ALJ to consider Listings
 13.02 and/or 13.13 for the first time. Thus, the Court orders that this case be remanded for further
 administrative proceedings.

1 that the doctor had not reached a firm diagnosis at that point. *Id.* The only seizure-related
 2 diagnosis listed in this treatment note is “seizures,” not “pseudoseizures.” *Id.*

3 In any event, the ALJ also addressed Plaintiff’s seizures in another section of the step-
 4 two findings, indicating that because Plaintiff’s seizures were controlled by medication, they
 5 were not severe. *See* AR 29. Plaintiff does not challenge this line of reasoning or otherwise
 6 show that her seizures (from whatever origin) were severe even with medication, and thus has
 7 failed to show harmful step-two error related to the ALJ’s assessment of Plaintiff’s seizures.
 8

9 **B. The ALJ Did Not Err in Assessing Medical Opinion Evidence**

10 The ALJ summarized February 2019 and January 2020 opinions written by treating
 11 physician Rachelle Guinto, M.D., and found them unpersuasive because they were inconsistent
 12 with and unsupported by the objective medical evidence and Plaintiff’s demonstrated
 13 functioning. AR 35-36 (citing AR 589, 1015-23, 1025). Plaintiff argues that these findings are
 14 erroneous.

15 *1. Legal Standards*

16 In assessing Plaintiff’s 2019 applications for benefits, the ALJ is required to articulate the
 17 persuasiveness of each medical opinion, specifically with respect to whether the opinions are
 18 supported by and consistent with the record. 20 C.F.R. §§ 404.1520c(a)-(c) 416.920c(a)-(c).
 19

20 The Commissioner argues that the regulations promulgated in 2017 changed the legal
 21 standards previously articulated by the United States Court of Appeals for the Ninth Circuit. *See*
 22 Dkt. 24 at 9-11. Under current Ninth Circuit precedent, an ALJ must provide “clear and
 23 convincing” reasons to reject an uncontradicted opinion from a treating or examining doctor, and
 24 “specific and legitimate” reasons to reject a contradicted opinion from such doctor. *Lester v.*
 25 *Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995). The Ninth Circuit has not yet addressed the 2017

1 regulations in relation to its standards for the review of medical opinions. It is not, in any event,
2 clear that the Court's consideration of the adequacy of an ALJ's reasoning under the new
3 regulations would differ in any significant respect. The new regulations still require ALJs to
4 explain their reasoning with specific reference to how they considered the supportability and
5 consistency factors, 20 C.F.R. §§ 404.1520c(a)-(b), 416.920c(a)-(b), and that reasoning must
6 remain legitimate. *See Thomas S. v. Comm'r of Social Sec.*, No. C20-5083 RAJ, 2020 WL
7 5494904, at *2 (W.D. Wash. Sept. 11, 2020). The Court must, moreover, continue to consider
8 whether the ALJ's analysis has the support of substantial evidence. *Ford v. Saul*, 950 F.3d 1141,
9 1154 (9th Cir. 2020). With these regulations and considerations in mind, the Court proceeds to
10 its analysis of the medical evidence in this case.

12 2. *Dr. Guinto's Opinions*

13 Plaintiff argues that the ALJ erred in finding that Dr. Guinto's opinions were not
14 supported by objective evidence, because it is unreasonable to require a physician to observe a
15 symptom such as a seizure or a panic attack before opining as to the limitations caused by that
16 symptom. Dkt. 23 at 5-6.

17 Plaintiff's argument fails to account for the entirety of the ALJ's analysis of Dr. Guinto's
18 opinions, however. The ALJ cited mental status examination findings showing Plaintiff to be
19 alert, oriented, calm, cooperative, and appropriately dressed and groomed; with congruent mood
20 and affect, and appropriate insight and judgment; and intact memory, concentration, and
21 attention. AR 35 (citing AR 553, 603, 757, 777, 779, 781, 786, 788, 791, 793, 795, 933, 992,
22 994, 996, 1002, 1011). This evidence is reasonably inconsistent with Dr. Guinto's opinions
23 describing several disabling mental cognitive and social limitations, and provides a sufficient
24 basis to find Dr. Guinto's opinions unpersuasive. *See Tommasetti v. Astrue*, 533 F.3d 1035,
25

1 1041 (9th Cir. 2008) (not improper to reject an opinion presenting inconsistencies between the
2 opinion and the medical record).

3 Furthermore, the ALJ also cited Plaintiff's functioning as inconsistent with Dr. Guinto's
4 opinions, specifically Plaintiff's ability to handle personal care, cook, clean, do laundry, drive,
5 shop, and care for four pets. AR 36 (citing AR 71-72, 77-78, 88-91, 361, 363). Plaintiff does
6 not reference let alone challenge this portion of the ALJ's reasoning, and it constitutes another
7 basis supported by substantial evidence for finding Dr. Guinto's opinions unpersuasive. *See*
8 *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001) (affirming an ALJ's rejection of a
9 treating physician's opinion that was inconsistent with the claimant's level of activity).
10

11 Because the ALJ explained why he found Dr. Guinto's opinions to be inconsistent with
12 and unsupported by other evidence in the record, and that reasoning is supported by substantial
13 evidence, the Court affirms the ALJ's assessment of Dr. Guinto's opinions.

14 **C. The ALJ Should Reconsider Plaintiff's Mental Allegations on Remand**

15 The ALJ discounted Plaintiff's subjective testimony because (1) her physical findings are
16 only mild, (2) her mental findings "were essentially normal", and (3) her activities are consistent
17 with an ability to "perform a full range of physical exertion." AR 32-34. Absent evidence of
18 malingering, an ALJ must provide clear and convincing reasons to discount a claimant's
19 subjective testimony. *See Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014). Plaintiff
20 raises several challenges to the ALJ's assessment of her testimony, which the Court will consider
21 in turn.
22

23 *1. Physical Findings*

24 The ALJ found that the treatment record failed to establish the existence of disabling
25 physical limitations, and instead showed "mild physical findings." AR 32.

1 In challenging the ALJ's interpretation of the medical record, Plaintiff states that there is
 2 no medical opinion to support the ALJ's conclusion that Plaintiff has no exertional limitations.
 3 Dkt. 23 at 9. Even if this were true,⁵ it would not necessarily show error in the ALJ's RFC
 4 assessment or interpretation of the medical record. *See Chapo v. Astrue*, 682 F.3d 1285, 1288
 5 (10th Cir. 2012) (holding that an RFC finding need not directly correspond to a specific medical
 6 opinion). The ALJ is tasked with "translating and incorporating clinical findings into a succinct
 7 RFC." *Rounds v. Comm'r of Social Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015) (citing
 8 *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008)). Furthermore, even if Plaintiff
 9 had been limited to medium work, as indicated by the State agency consultants (AR 128-30, 145-
 10 46, 164-66, 182-84), such a limitation would have been consistent with the medium and light
 11 jobs identified by the ALJ at step five. *See* AR 37. Thus, Plaintiff has not established harmful
 12 error in this line of the ALJ's reasoning.

14 2. Activities

15 The ALJ found that Plaintiff's activities are "consistent with the ability to perform a full
 16 range of physical exertion," citing Plaintiff's ability to care for pets, drive, prepare meals,
 17 complete household chores, shop, work in the garden, attend church, socialize, and play games
 18 with others. AR 34. The ALJ did not attempt to explain how these activities demonstrate the
 19 existence of transferable work skills, and thus the ALJ's activities finding is appropriate only if it
 20 pertains to an inconsistency with Plaintiff's allegations. *See Orn v. Astrue*, 495 F.3d 625, 639
 21 (9th Cir. 2007) (activities may undermine credibility where they (1) contradict the claimant's
 22 testimony or (2) "meet the threshold for transferable work skills").
 23

24
 25 ⁵ Dr. Guinto left blank the sections of an opinion addressing exertional limitations. *See* AR 1016-17. Dr. Guinto also failed to reference any exertional limitations when describing why Plaintiff could not work for six months. *See* AR 1025. This evidence supports the ALJ's finding that Plaintiff does not have any exertional limitations.

1 Earlier in the decision, the ALJ noted that Plaintiff alleged various physical limitations.
2 See AR 32. Some of the activities the ALJ listed (such as preparing meals, completing
3 household chores, driving, gardening) reasonably contradict some of these allegations, such as
4 problems using hands, sitting, bending, and reaching. Thus, Plaintiff has not shown that the ALJ
5 erred in finding that Plaintiff's activities were inconsistent with her alleged physical limitations.

6
7 3. *Psychological Findings*

8 Plaintiff disputes that the record demonstrates normal psychological findings, as the ALJ
9 found, pointing to evidence of her schizoaffective disorder and her regimen of anti-psychotic
10 medication. Dkt. 23 at 6-7.

11 The ALJ found that Plaintiff has schizoaffective disorder (AR 29), and also referenced
12 Plaintiff's treatment regimen of therapy and medication (AR 33-34). The ALJ also went on to
13 cite Plaintiff's abnormal psychological findings, such as visual and auditory hallucinations,
14 obsessions, and delusions, as well as complaints of worsening anxiety/depression symptoms and
15 "spacing out". AR 34 (citing AR 932, 958, 1008); see also AR 605 (anxiety-related shaking),
16 744 (panic attack), 791 (auditory hallucinations), 810 (worsening panic attacks), 1025-27 (panic
17 attacks and auditory hallucinations).

18 Despite the ALJ's explicit discussion of some of these abnormal findings, the ALJ
19 concluded that Plaintiff's "[p]sychological findings were essentially normal, and counseling
20 records show that the claimant is stable." AR 32. This characterization of the record is not
21 entirely accurate as to the record as a whole, and thus does not convincingly explain why the
22 ALJ found the record to be inconsistent with Plaintiff's complaints.
23
24
25

1 Although the ALJ's reasoning as to Plaintiff's physical allegations is legally sufficient,
2 because this case must be remanded on other grounds, the ALJ should reconsider Plaintiff's
3 allegations of mental limitations on remand.

4 **D. The ALJ Should Address Lay Statements on Remand**

5 The record contains several lay statements from Plaintiff's friends, family, and co-
6 workers. *See* AR 322-37, 352-56, 368-75, 427, 460. The ALJ did not discuss any of these
7 statements in the decision, but in the Ninth Circuit, an ALJ must provide germane reasons to
8 discount lay statements. *See Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). If a lay
9 witness's testimony is similar to other properly discounted evidence, an ALJ's failure to discuss
10 a lay statement can be harmless. *See Valentine v. Comm'r of Social Sec. Admin.*, 574 F.3d 685,
11 693-94 (9th Cir. 2009) ("In light of our conclusion that the ALJ provided clear and convincing
12 reasons for rejecting Valentine's own subjective complaints, and because Ms. Valentine's
13 testimony was similar to such complaints, it follows that the ALJ also gave germane reasons for
14 rejecting her testimony.").

15 The Commissioner contends that the ALJ's error in failing to discuss the lay statements
16 was harmless because the lay witnesses did not describe any limitations that the ALJ did not
17 already discuss in the decision when addressing Plaintiff's testimony. Dkt. 24 at 12-13. Even if
18 this error could be harmless, because this case must be remanded on other grounds, the ALJ
19 should address the lay statements on remand and either credit them or provide legally sufficient
20 reasons to discount them.

21 **E. The Court Need Not Address the ALJ's Development of the Record**

22 Plaintiff requested additional time to secure evidence after the administrative hearing, and
23 the ALJ agreed to hold the record open for a "couple of weeks." AR 117. Thereafter, Plaintiff
24
25

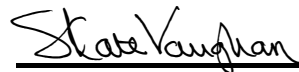
1 requested and extension of 30 additional days to secure certain evidence. AR 433-34. Plaintiff
2 was granted a 10-day extension, and on the tenth day, requested 30 additional days. AR 463-64.
3 The ALJ did not rule on this request, but instead issued the decision finding Plaintiff not
4 disabled.

5 Plaintiff did not submit any additional medical evidence to the Appeals Council or to this
6 Court, but argues that the ALJ should have granted the extension request and/or held a
7 supplemental hearing. Dkt. 23 at 10-12. Because this case must be remanded on other grounds
8 and Plaintiff will be provided another hearing and opportunity to submit evidence, the Court
9 need not address this assignment of error.
10

11 CONCLUSION

12 For the reasons set forth above, the Commissioner's final decision is **REVERSED** and
13 this case is **REMANDED** for further administrative proceedings under sentence four of 42
14 U.S.C. § 405(g). On remand, the ALJ should reconsider Plaintiff's brain tumor at steps two and
15 three and explicitly discuss whether Plaintiff meets or equals Listings 13.02 and 13.13. The ALJ
16 shall also explicitly address the lay statements, reconsider Plaintiff's mental allegations, and may
17 reconsider any other portion of the decision as necessary.

18 Dated this 11th day of June, 2021.
19
20

21 

22 S. KATE VAUGHAN
23 United States Magistrate Judge
24
25